Q-1- Define 'Foreign Award' under the New Yark convention and discuss the conditions for the enforcement for Foreign award.

With the object to achieve international standard in arbitration law and to enforce the foreign arbitral awards, the law relating to domestic arbitration and international commercial arbitration were added, amended and modified accordingly to suit in order to be effective in regard to the present global need of arbitration law.

The present enacted law has its origin from various sources. In this context firstly provisions of the Arbitration (Protocol and Convention) Act, 1937 and secondly, the Foreign Awards (Recognition and Enforcement) Act, 1961, have been inducted in Part II of Act, 1996 however with certain deletions and amendments in the Act of 1937 and the Act of 1961, to ensure and to reflect the provisions enumerated in the Geneva Protocol on Arbitration Clauses, 1923, the Convention on the Execution of Foreign Arbitral Award, 1927 and the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

Thus, Chapter I of Part II with headings "Enforcement of Certain Foreign Awards" and "New York Convention Awards" respectively were enacted to incorporate 1961 Act with certain modifications in this regard are

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CHAPTER 1

NEW YORK CONVENTION AWARDS

Section 44. Definition. In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960—

(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and

(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by

notification in the Official Gazette, declare to be territories

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Section 44 is on the pattern of Article I of the New York Convention and similar to Section 2 of the 1961 Act which defines a "Foreign Award" under Chapter I, Part II. The Supreme Court said that this Chapter would not be applied where the awards are made in foreign countries which are not parties to the New York Convention.

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or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea road.

Thus, according to aforesaid quotation by the Supreme Court any relationship which is of commercial nature, is not necessarily to be confined only to some transaction, because the expression "commercial relationship" is capable to include a large number of transactions as such, making difficult to be enumerated for the purpose of the Act in Section 44. To apply under this section "commercial relationship" must be of commercial nature which is most essential aspect of relationship to be called "commercial". It is purely immaterial that such relationship is contractual or not.

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letters or telegrams. That also means that the parties to an arbitration agreement in writing are not required to be physically present while making such an agreement i.e., a resident of India, can make an arbitration agreement with resident of any foreign national by the modern means of communication such as telex, fax, cables and telephone etc.

Clause (b) of Section 44 provides the declaration in respect of Section 2(b) of 1961 Act, made by the Central Government which, states the following territories to be the territories to which the New York Convention applies-Austria, Belgium, Botswana, Bulgaria, Central African Republic, Chile, Cuba, Czechoslovok Socialist Republic, Denmark Republic, Ecuador, Arab Republic of Egypt, Finland, France, German Democratic Republic, Federal Republic of Germany, Ghana, Greece, Hungary, Italy, Japan, Kuwait, Republic of Korea, Malagasy Republic, Mexico, Morocco, Nigeria, The Netherlands, Norway, Philippines, Poland, Romania, San Marino, Spain, Sweden, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, U.S.S.R., U.K., United Republic of Tanzania and United States of America

These 44 countries under the declaration by the Central Government in notification in the official gazette have been declared that on reciprocal basis India also being a party in the New York Convention may enter into an arbitration agreement whether it is contractual or non-contractual but considered as commercial in nature within the meaning of Section 44(b) of the Act, 1996.

(i) The term "foreign award"-Meaning of

According to Section 44 of the Act, 1996 the term "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960.

Certainly, the term "foreign award" means the award made as a result of the foreign arbitration which is not a domestic arbitration. It becomes necessary to understand the term "foreign arbitration". The Calcutta High Court in case of Serajuddin v. Michael Golodetz, laid down the necessary conditions relating to the term "foreign arbitration"— these are as under :-

(a) arbitration should have been held in foreign lands, by foreign

arbitrator;

(b) arbitration by applying foreign laws;

(c) as a party foreign national is involved.

These are essential elements of a foreign arbitration, resulting into the

foreign award.

To explain the term "foreign award" the Apex Court in N.T.P.C. v. Singer Company, observed that where in London an interim award was made which arose out of an arbitration agreement governed by the Indian Laws. It was held that such an arbitral award cannot be treated as a award and it is purely a "domestic award" which is governed by the laws of India in respect of the agreement and arbitration. foreign

(ii) Distinction between the "foreign award" and "Domestic award"

In case of a foreign award, one of the parties is a national of foreign country, whereas this is not necessary in case of domestic award.

In foreign award subject-matter of arbitration agreement deals with the international commerce and trade, thus, it is international in character Also, the award is made in a foreign country. These elements cannot be found in a "domestic award". To illustrate the above distinction the decision of the Delhi High Court

in Dorstener Maschine (Germany) v. Sand Plast India, is cited wherein against the enforcement of foreign award in Germany, an injunction was sought in India, the Delhi High Court refused to grant an injunction. In fact the subject matter of disputes was referred for arbitration to Indo-German Chamber of Commerce. Two arbitrators were appointed by each of the party. In arbitration process the counter claim of the Dorstener was rejected whereas the claim of Sand Plast was allowed. Since, Dorstener had no assets in territory of India, Sand Plast on receiving of the copy of the award initiated the proceedings regarding enforcement of the award in Germany. The respondent i.e., Dorstener sought an interim injunction against the enforcement of award. The court while refusing to grant injunction held that in the view of New York Convention the case being a foreign award and agreement had a foreign element involving international commerce and trade the German company should not be permitted to restrain the Indian Company from enforcing the

award in Germany by way of injunction as such. Hence, New York Convention was applicable to the matter.

(iii) "Foreign Award"-When can be treated as "Domestic Award" The Supreme Court in Bhatia International v. Bulk Trading S.A., observed that awards in arbitration proceedings which take place in a non convention country are not considered to be "foreign award" under the Arbitration and Conciliation Act, 1996. They would thus not be covered by Part II. An award passed in an arbitration which takes place in India would be a "domestic award". There would thus be no need to define an award as a "domestic award" unless the intention was to cover awards which would otherwise not be covered by this definition. Strictly, an award passed in an arbitration which takes place in a non-convention country (i.e., the country

which is not a signatory of UNCITRAL Model Law) would not be a "domestic award". Thus, the necessity is to define a "domestic award" as including all awards made under Part I of the said Act. The definition indicates that an

award made in an international commercial arbitration held in a non-convention country is also considered to be a "domestic award".

(iv) Meaning of term "Commercial relationship" in the context of foreign awards

The Supreme Court in R.M. Investment & Trading Co. Put. Ltd. v. Boeing Co., observed that the term "Commercial" in the context of foreign awards should be construed broadly having regard to the New York Convention Awards and also manifold activities which are necessary elements of modern international trade and commerce. The court is of the ele that while construing the expression "commercial relationship" in the Text of Section 44 the reference of the Model Law is desirable which states -

"The term "Commercial" should be given a wide interpretation so as to cover matters arising from all relationship of a commercial nature, whether contractual or not. Relationship of a commercial nature include, but are not limited to, the following transactions, any trade transaction for the supply or exchange of goods or service; distribution agreement, commercial representation or agency; factoring, leasing,

construction of works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreement concession, joint venture and other forms of industrial or business cooperation, carriage of goods or passengers by air, sea, rail or road."

It was held that the agreement between the Indian Company and foreign company whereunder the Indian Company agreed to provide the foreign company with consultant service for promotion of sale of boeing aircrafts in India was involving commercial relationship within the meaning of Section 44.

(v) Words "law in force in India"-Meaning of

The Bombay High Court in European Grain & Shipping v. Bombay Extractions, has held that the words "law in force in India" are intended to mean a particular law specifically enacted for the purpose of Section 44.

Section 45. Power of judicial authority to refer parties to arbitration.-Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908) a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being) performed.

COMMENTS

Section 45 has been enacted in line with Article II(3) of the New York Convention. The object of this section is to give overriding effect, if any,

provisions of Part I and the provisions of the Code of Civil Procedure over are opposed to the provision contained in the present Act.

Section 45 reproduces Section 3 of Act, 1961, but with certain specified changes to make parallel provision with Article 3 of the New York Convention. It is the requirement of this Section that the judicial authority has to make sure that the arbitration agreement is valid, operative and capable of being performed before referring the parties to arbitration in respect of disputes for which there is an arbitration agreement in writing between the parties. Although, with the use of express "shall" it is in the sense of an obligation,

therefore, becoming a discretionary power of the judicial authority, so unless specified conditions are not fulfilled, this section cannot be invoked. In the words of the Supreme Court of India - The Section uses the expression "shall" which signifies that it is obligatory upon the judicial authority to refer the parties to arbitration, if conditions specified therein are fulfilled" 1

Further, expression that "a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44", that is to say that the judicial authority refers the parties to arbitration, it does not mean that the judicial authority can compel a party who is not willing to go to arbitration for reasons known best to that party.

Section 45 and also Section 44 would be applied to only such arbitration agreement which concludes to "Foreign award" however, Section 45 does not prescribe any time limit within which a party intends to exercise the arbitration agreement before a judicial authority. According to the New York Convention which did not touch this point but expected that such time limit in such matters is to be regulated by the meeting rather discussion as it depends upon the circumstances of each case.

Section 45 states that the judicial authority may refer the parties to arbitration at the request of one of the parties or any person claiming through or under him. Thus, it is necessary that any party should make a request before the judicial authority, when seeking relief under an arbitration agreement. The judicial authority has to find out that the arbitration agreement through which party is seeking reference of dispute to an arbitration is not null and void, inoperative or incapable of being performed. It is necessary under this section that the judicial authority has to record its findings whatsoever its directions may be.

The arbitration clause in an arbitration agreement can only apply to time charter and not to bill of lading to which plaintiff is a party and said clause is vague and uncertain and not binding on party.

(i) Expression "shall" denotes obligation upon the judicial authority

The Apex Court in Renusagar Power Co. Ltd. v. General Electric Co. observed that Section 45 uses the expression "shall" which denotes that the judicial authority is under obligation to refer the parties to arbitration,

provided the conditions laid down in the arbitration agreement are satisfied. Even if there is an arbitration agreement between the parties, the court suo motu cannot refer the parties to the arbitration except that the court is competent to proceed with the case.

(ii) Applicability of Section 45

The Delhi High Court in Gas Authority of India Ltd. v. SPIE CAPAG SA,' has held that Section 3 of the 1961 Act (which corresponds to Section 45 of the 1996 Act) dealing with stay of proceedings in respect of matters to be referred to arbitration applies to an arbitration agreement if it has a foreign element involving international trade and commerce even though such an agreement does not result into a foreign award. However, this decision cannot outrightly be applied because Sections 44 and 45 of the present Act, 1996 cover only such arbitration agreement which necessarily results into a foreign award within the ambit of Section 44 of the Act.

In another case Goyal MG Gases Ltd. v. Griesheim GMBH, the court observed that the provisions of Section 45 of the new Act, 1996 are clear and apparent that the judicial authority when seized of an action in a matter in respect of which the parties have made an agreement in the nature of and as provided under Section 44 refer the parties to arbitration at the request of one of the parties or any person claiming through or under him. The provisions of the clause referred expressly intended that it would survive the termination of agreement under the rules of the International Chamber of Commerce, Paris.

(iii) Bifurcation of subject matter of suit not contemplated under the Act, 1996

In India Household and Health Care Ltd. v. L.G. Household and Health Care Ltd., wherein certain of the reliefs prayed for by the applicant relating to use of the LG logo fall outside the arbitration agreement since the LG logo belongs to LG corporation which is the owner of the trademark. It is not a party to the arbitration agreement. It allegedly has filed a separate suit. In a case of this nature there is no provision in the Arbitration and Conciliation Act, 1996 that when the subject matter of the suit includes subject mater of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the

subject mater of the suit to the arbitrators. If the bifurcation of the subject matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject matter of an action brought before a judicial authority is not allowed.

(iv) Proceedings parallel to the arbitration cannot be allowed to continue

Incorporation of Arbitration clause in the "Bill of Lading" cannot be

treated as inoperative merely because such incorporation lacks substitution of the words "charter party" by the words "Bill of Lading" in the conditis clause of the Bill of Lading While incorporating therein the arbitration clause of the charter party agreement, presently, clause 82 of this agreement) when the intentions and agreement of the parties to the Bills of Lading are clear, no absurdity or inconsistency would be attribute for such interpretation: It was held that the proceedings parallel to the arbitration cannot be allowed to continue. Hence suit is liable to be a legend.

(v) Petition for stay of admiralty suit in High Court is allowed

In the Owners and Parties Interested in Vessel M.V. Baltic Confidence

& another v. State Trading Corporation of India Ltd, it was held that when the arbitration clause of the Charter party agreement (clause 62) has been incorporated in the Bill of Lading by specific reference by its siause (1) then it shows that the parties had intended that the disputes arising on the Bill of Lading should be resolved by arbitrator. Hence, the High Court was wrong in taking contrary view. Therefore, petition filed by the appellant for

stay of admiralty suit in High Court is allowed.

(vi) High Court refusing to refer the dispute to arbitration Conflicting decision on this issue

Where in an appeal preferred against the order passed under Section 45 of the Arbitration and Conciliation Act, 1996 by a single judge of the High Court refusing to refer the dispute to the arbitration, there being conflicting case laws on this question, the matter was directed to be placed before three Judges Bench of the Apex Court.

(vii) The conflicting awards would not, under the arbitration agreement, be incapable of performance

The Bombay High Court in Indian Organic Chemicals Ltd. v. Chentex Fibres Inc., has held that possibility of conflicting awards would merely make invocation of the arbitral provisions undesirable or improper or inexpedient. But, that would not be the same thing as incapable of being performed within the meaning of the said expression occurring in the section. But, when all the agreements

were put together, they became

inoperative as one agreement provided for one set of arbitrators at a particular place in a country and another agreement provided for another set of arbitrators at a different place and in a different country. The Supreme Court has held that the High Court's view that each of the agreements standing by itself was valid, operative and capable of being performed, is totally erroneous. It was necessary to consider only the relevant agreement and so considered all the conditions contained for the applicability of Section 3 of the FARE Act were fully complied with.

Section 46. When foreign award binding.-Any foreign award which would be enforceable under this Chapter shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India and any references in this Chapter to enforcing a foreign award shall be construed as including references to relying on an award

COMMENTS

Section 46 is enacted parallel with Article III of the New York Convention and is on the pattern of Section 4(2) of the 1961 Act.

Section 46 has been incorporated with a liberal object to recognise all the "Foreign Awards" under this Chapter which is enforceable in India, even for the purpose of defence, set-off or in any legal proceedings in India. Thus, any foreign award under this Chapter becomes enforceable and shall have binding force upon the parties between whom it was made. These parties may rely on such a foreign award by way of claim, defence, set-off and in any legal proceedings initiated in India

Section 47. Evidence.-(1) The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court

(a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made;

(b) the original agreement for arbitration or a duly certified copy thereof; and

(c) such evidence as may be necessary to prove that the award is a foreign award.

(2) If the award or agreement to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

Explanation.-In this section and all the following sections of this Chapter, "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction over the subject-matter of the award if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

COMMENTS

Section 47 of the Act, has been enacted paralled to Article IV of the

New York Convention and is in line with Section 8 of 1961 Act.

Section 47 provides specified conditions to be fulfilled by the party, who is seeking enforcement of a foreign award. It is a mandatory provision. Thus, Section 47 prescribes the evidence the party has to be made prima facie before the Court for enforcement of a foreign award.

Section 47(1) provides that the following documentary evidences have to be produced before the Court, at the time of application for the enforcement of a foreign award-by a party

1. Original award or a copy of it, which should be authenticated according to the law of that country in which it was made.

2. The original agreement for arbitration or a certified copy of

arbitration agreement, and

3. Such other evidence as may be necessary to show that the award is a foreign award.

The Court in its discretion may permit the party to fulfil these aforesaid conditions during the proceedings. It is expected that the court should not adhere too strictly in this respect, but to consider the reasonableness of the circumstances. Section 47(2) provides that if such an award is in foreign language or

arbitration agreement is in foreign language, its translated copies should be

produced in English. It is required that such translated copies must be

certified as correct translation by a diplomatic or consular agent of the

country to which that party belongs or certified as correct in such other

manner as may be sufficient according to the law of India, in force.

Explanation attached to this section defines the "Court" for the purpose of this chapter. The court means, and excludes any civil court of a grade inferior to such principal civil court, or any court of small causes, but it includes the principal civil court of original jurisdiction in a district and the High Court in exercise of its ordinary original civil jurisdiction and any subject matter over which it is having jurisdiction of a suit.

No time limit for enforcement of a foreign award has been prescribed in Part II of Chapter I. The Indian courts have given conflicting views. The Gujarat High Court is of view that-"It cannot be that a foreign award can be enforced at any time, though a domestic award can be enforced only within specified time limit.' So, the Limitation Act may be applied as it applies to proceedings in Court.

The Delhi High Court is of the opinion that "Since Part II does not prescribe any time limit in this regard, the Limitation Act, 1963, being an integral part of the procedural law of India, applies."

Now, it is clear that for enforcement of a foreign award under this Section 47, Part II, no time limit has been prescribed, however, non-compliance of the procedural law of India, while such enforcement of a foreign award is sought before the court in India, the Limitation Act, should be followed. 1.

Q-2- What do you understand b4 foreign award? Distinguish a foreign award from the domestic? Discuss.

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The present enacted law has its origin from various sources. In this context firstly provisions of the Arbitration (Protocol and Convention) Act, 1937 and secondly, the Foreign Awards (Recognition and Enforcement) Act, 1961, have been inducted in Part II of Act, 1996 however with certain deletions and amendments in the Act of 1937 and the Act of 1961, to ensure and to reflect the provisions enumerated in the Geneva Protocol on Arbitration Clauses, 1923, the Convention on the Execution of Foreign Arbitral Award, 1927 and the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

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Interpreted and applied through a statutory provision under the law in force in India.

Clause (a) of Section 44 contains the expression, "An agreement in g for arbitration" that means, an agreement should be written to provide "certainty' in its terms and conditions. that in case of exigencies prove be interpreted to avoid any misunderstanding which may be a cause 1 inch disputes. According to Article II(2) of the New York Convention, an arbitration "in writing" may be either signed by the parties or contained in an exchange of letters or telegrams. That also means that the parties to an arbitration agreement in writing are not required to be physically present while making such an agreement i.e., a resident of India, can make an arbitration agreement with resident of any foreign national by the modern means of communication such as telex, fax, cables and telephone etc.

Clause (b) of Section 44 provides the declaration in respect of Section 2(b) of 1961 Act, made by the Central Government which, states the following territories to be the territories to which the New York Convention applies-Austria, Belgium, Botswana, Bulgaria, Central African Republic, Chile, Cuba, Czechoslovok Socialist Republic, Denmark Republic, Ecuador, Arab Republic of Egypt, Finland, France, German Democratic Republic, Federal Republic of Germany, Ghana, Greece, Hungary, Italy, Japan, Kuwait, Republic of Korea, Malagasy Republic, Mexico, Morocco, Nigeria, The Netherlands, Norway, Philippines, Poland, Romania, San Marino, Spain, Sweden, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, U.S.S.R., U.K., United Republic of Tanzania and United States of America

These 44 countries under the declaration by the Central Government in notification in the official gazette have been declared that on reciprocal basis India also being a party in the New York Convention may enter into an arbitration agreement whether it is contractual or non-contractual but considered as commercial in nature within the meaning of Section 44(b) of the Act, 1996.

(i) The term "foreign award"-Meaning of

According to Section 44 of the Act, 1996 the term "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960.

Certainly, the term "foreign award" means the award made as a result of the foreign arbitration which is not a domestic arbitration. It becomes necessary to understand the term "foreign arbitration". The Calcutta High Court in case of Serajuddin v. Michael Golodetz, laid down the necessary conditions relating to the term "foreign arbitration"— these are as under :-

(a) arbitration should have been held in foreign lands, by foreign

arbitrator;

(b) arbitration by applying foreign laws;

(c) as a party foreign national is involved.

These are essential elements of a foreign arbitration, resulting into the

foreign award.

To explain the term "foreign award" the Apex Court in N.T.P.C. v. Singer Company, observed that where in London an interim award was made which arose out of an arbitration agreement governed by the Indian Laws. It was held that such an arbitral award cannot be treated as a award and it is purely a "domestic award" which is governed by the laws of India in respect of the agreement and arbitration. foreign

(ii) Distinction between the "foreign award" and "Domestic award"

In case of a foreign award, one of the parties is a national of foreign country, whereas this is not necessary in case of domestic award.

In foreign award subject-matter of arbitration agreement deals with the international commerce and trade, thus, it is international in character Also, the award is made in a foreign country. These elements cannot be found in a "domestic award". To illustrate the above distinction the decision of the Delhi High Court

in Dorstener Maschine (Germany) v. Sand Plast India, is cited wherein against the enforcement of foreign award in Germany, an injunction was sought in India, the Delhi High Court refused to grant an injunction. In fact the subject matter of disputes was referred for arbitration to Indo-German Chamber of Commerce. Two arbitrators were appointed by each of the party. In arbitration process the counter claim of the Dorstener was rejected whereas the claim of Sand Plast was allowed. Since, Dorstener had no assets in territory of India, Sand Plast on receiving of the copy of the award initiated the proceedings regarding enforcement of the award in Germany. The respondent i.e., Dorstener sought an interim injunction against the enforcement of award. The court while refusing to grant injunction held that in the view of New York Convention the case being a foreign award and agreement had a foreign element involving international commerce and trade the German company should not be permitted to restrain the Indian Company from enforcing the award in Germany by way of injunction as such. Hence, New York Convention was applicable to the matter.

(iii) "Foreign Award"-When can be treated as "Domestic Award" The Supreme Court in Bhatia International v. Bulk Trading S.A., observed that awards in arbitration proceedings which take place in a non convention country are not considered to be "foreign award" under the Arbitration and Conciliation Act, 1996. They would thus not be covered by Part II. An award passed in an arbitration which takes place in India would be a "domestic award". There would thus be no need to define an award as a "domestic award" unless the intention was to cover awards which would otherwise not be covered by this definition. Strictly, an award passed in an arbitration which takes place in a non-convention country (i.e., the country

which is not a signatory of UNCITRAL Model Law) would not be a "domestic award". Thus, the necessity is to define a "domestic award" as including all awards made under Part I of the said Act. The definition indicates that an

award made in an international commercial arbitration held in a non-convention country is also considered to be a "domestic award".

(iv) Meaning of term "Commercial relationship" in the context of foreign awards

The Supreme Court in R.M. Investment & Trading Co. Put. Ltd. v. Boeing Co., observed that the term "Commercial" in the context of foreign awards should be construed broadly having regard to the New York Convention Awards and also manifold activities which are necessary elements of modern international trade and commerce. The court is of the ele that while construing the expression "commercial relationship" in the Text of Section 44 the reference of the Model Law is desirable which states -

"The term "Commercial" should be given a wide interpretation so as to cover matters arising from all relationship of a commercial nature, whether contractual or not. Relationship of a commercial nature include, but are not limited to, the following transactions, any trade transaction for the supply or exchange of goods or service; distribution agreement, commercial representation or agency; factoring, leasing, construction of works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreement concession, joint venture and other forms of industrial or business cooperation, carriage of goods or passengers by air, sea, rail or road."

It was held that the agreement between the Indian Company and foreign company whereunder the Indian Company agreed to provide the foreign company with consultant service for promotion of sale of boeing aircrafts in India was involving commercial relationship within the meaning of Section 44.

(v) Words "law in force in India"-Meaning of

The Bombay High Court in European Grain & Shipping v. Bombay Extractions, has held that the words "law in force in India" are intended to mean a particular law specifically enacted for the purpose of Section 44.

Section 45. Power of judicial authority to refer parties to arbitration.-Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908) a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being) performed.

COMMENTS

Section 45 has been enacted in line with Article II(3) of the New York Convention. The object of this section is to give overriding effect, if any,

Q-3- Which case does An appeal lie against an order passed under the Arbitration And conciliation act, 1996? Discuss the provisions regarding appeals, whether second appeal also lie?

APPEALS

Section 37. Appealable orders.-(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely,

(a) Granting or refusing to grant any measure under Section 9;

(b) setting aside or refusing to set aside an arbitral award under Section 34,

(2) Appeal shall also lie to a court from an order of the arbitral tribunal

(a) accepting the plea referred to in sub-section (2) or sub-section

(3) of Section 16; or

(b) granting or refusing to grant an interim measure under

Section 17. (3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

COMMENTS

Section 37 is not modelled on the Model Law, but it is analogous to Section 39 of the Arbitration Act, 1940. Section 37(1) provides for appeals against orders of court in two ways

(i) To grant any interim measures under Section 9, or

(ii) to set aside or refuse to set aside an arbitral award under Section 34

Further, this sub-section (1) provides that an appeal shall lie to "the court authorised by law to hear appeals from original decrees of the court passing the order". Thus, this sub-section (1) provides for an appeal from court orders.

Section 37(2) provides that an appeal shall lie to a court from an leder of the arbitral tribunal, when either of the following conditions are fulfilled (1) under Section 16(2) or Section 16(3) referred application has been accepted, or

(ii) under Section 17, to grant interim measure or refusing to grant

interim measure. The orders of arbitral tribunals have been made appealable. This is a new stage of development in the Act of 1996. Now, the arbitral tribunal has freedom to act in a judicial way.

Section 37(3) prohibits second appeals, from an order passed in appeal under this section, but further states that any right to appeal to the Supreme Court is in no way prohibited. Thus, second appeals can be made to the Supreme Court under the Constitution of India and is also provided in the Supreme Court Rules. It was held by the Allahabad High Court that "the jurisdiction conferred on the Supreme Court by the Constitution of India cannot be taken away or abridged by any statute."

Section 37 of Act, 1996 barred a second appeal from an appellate order. A revisional application against an appellate order under Section 37 is not maintainable even before the High Court. Under Section 16(6) of the Act, 1996 an aggrieved party is given a right

(i) Scope of Section 37

to challenge award on that ground in accordance with Section 34. If the plea of jurisdiction is not raised at this stage then it cannot be raised under Section 34. However, under both the Sections 13 and 16, a party cannot file such a petition unless the procedure contemplated thereby is followed. It is settled law that if the Arbitral Tribunal accepts the plea about lack of its jurisdiction or that certain dispute is beyond the scope of its authority an appeal lies from such order to court under Section 37(2)(a) of the new Act, 1996.

The Bombay High Court in Atul R. Shah v. Vrijjal Lalloo Bhai & Co., has held that a court without jurisdiction merely on account of non-objection by the parties cannot assume jurisdiction in itself. The same is also applicable to arbitral tribunal.

(ii) Appeal filed against partial award-not maintainable In National Thermal Power Corporation Ltd. v. Siemens Atkeingesells Chaft, wherein opposite party has not taken any

plea of jurisdiction before Arbitral Tribunal, but has raised certain counterclaims. However, claimant has opposed such counterclaims, inter alia, on the ground that they were not arbitrable. The Arbitral Tribunal by a partial award rejected the counterclaims of the opposite party as having already been settled in earlier meeting between the parties. It was held that such a partial award did not involve a question of jurisdiction. Hence, the case of opposite party, even if it was aggrieved by such a partial award, it did not fall within the purview of Section 16(2) or 16(3) of the Act. So, appeal filed by it against the partial award directly under Section 37(2)(a) of the Act, is not maintainable.

(iii) Revision application is not maintainable against appellate order

In Shyam Sunder Agarwal & Co. v. Union of India,' the Apex Court has held that Part I does not contemplate any revision of the appellate order under Section 37 of the Act, 1996. In view of the bar contained in Section 5, a revisional application before the High Court against the appellate order passed under Section 37 is not maintainable.

(iv) No second appeal would lie against order passed under Section 37

Since a second appeal from an appellate order under Section 37 is expressly barred, Letters Patent Appeal from an appellate order passed under Section 37 before a Division Bench of the High Court, it is no exception to such bar on a second appeal. Though, no second appeal would lie from an appellate order passed under Section 37 of the Act, 1996. But, no statute is capable to take away the right to appeal to the Supreme Court, as this jurisdiction has been conferred on the Supreme Court by the Constitution of India, 1950. Thus an appeal may be maintainable from an appellate order before the Supreme Court.

(v) Section 37(3) bars only a second appeal and not revision

In I.T.I. Ltd. v. Siemens Public Communication Network Ltd., the Supreme Court considered whether the order passed under Section 37 is revisable? It has been held that an appellate order passed by a Court under Section 37 is revisable by the High Court under Section 115 of the Code of Civil Procedure, 1908. The Court made it clear that Section 37(3) bars only a second appeal and not revision. Merely because the new Act, 1996 has not provided about the Code of Civil Procedure being applicable, an inference cannot be drawn that Civil Procedure Code is inapplicable to the proceedings under the Act. The power of revision under Section 115 of the Code cannot be readily inferred to have been excluded by the provisions of a Special Act unless such exclusion is clearly expressed by the Act. This

decision of the Supreme Court has been affirmed in Nirma Ltd. v. Lungi Lent Jes Energietecnik Gmbh,

In terms of similarity of reasoning a revision under Section 115 of the

Code would also lie from a non-appealable original order, if passed by a Court under the provisions of the present Arbitration and Conciliation Act, 1996.

(vi) No appeal is maintainable as appeal from appellate order

The Gujarat High Court in Sundaram Finance Ltd., Chennai v. Govind

Swarup Mitral, wherein the first appellant challenged the arbitral award by way of filing application (Civil Mise) in the city civil court allowed the said application and set aside the award of sole arbitrator. In this appeal the said decision of the trial court was under challenge by virtue of the provision in Soction 37(1)(b) of the Act, 1996.

The Court observed as under :-

"The effect of the provision contained in Section 3 would be that an application under Section 34 for setting aside the arbitral award must be treated as a substantive proceeding so far as the rights of the parties to the award are concerned. Such proceedings are required to be undertaken before the civil court of principal original jurisdiction as defined under Section 2(e) of the Act, It is obvious that in an appeal from order, right of the parties would be limited whereas in first appeal, rights of the parties would be better and longer in nature." It has been held that the appeal, which has been filed by the present appellant, cannot be said to be maintainable as appeal from order i.e.,

from appellate order.

(vii) Appeal under Article 136 of the Constitution of India, 1950 is ordinarily not maintainable

In M/s. I.T.I. Ltd. v. M/s. Siemens Public Communication Network Ltd.," the Apex Court held that the supervisory jurisdiction to be exercised by the High Court under Section 115 of the

Code of Civil Procedure, 1908 is for the purpose of correcting jurisdictional error, if any, committed by a sub-ordinate Court in exercise of power in appeal under Section 37(2) of the Arbitration and Conciliation Act, 1996. The approach made to the Revisional Court under Section 115 of the said Code is not a resort to remedy of appeal. The Apex Court was of the view that in appeal, interference can be made both on facts and law whereas in revision only errors relating to jurisdiction can be corrected. Such revisional remedy is not expressly barred by the provisions of the Act, 1996. The Apex Court did not find any implied exclusion of the same on examination of the scheme and relevant provisions of the Act, 1996. Apex Court

In the present case the Section 115 of the Code lies to High Court as against an order made by a Civil Court in an appeal under Section 37(2) of the Act, 1996. Such a remedy by way of revision is an alternate and efficacious remedy. Hence, direct appeal under Article 136 of the Constitution of India is ordinarily not maintainable.

(viii) No interference under Article 136 of the Constitution of India-When the order is appealable

The Supreme Court in Mulkraj Chhabra & others v. New Kenilworth Hotels Ltd. & another,' has held that the impugned order passed under the Arbitration and Conciliation Act, 1996 is admittedly appealable before a Division Bench of the High Court under Section 37 of the said Act, hence no interference is warranted under Article 136 of the Constitution of India, 1950.

(IX) Power of Arbitral Tribunal to award interest

The Supreme Court in Krishna Bhagya Jala Nigam Ltd. v. G.

Harishchandra Reddy and another, has held that awarding interim @ 18% Before-arbitration, pendente lite and post-arbitral award period is not 101 or as interest rate has gone down after economic reforms. Hence, rate P interest is liable to be reduced, 'although the arbitral tribunal is empowered to award interest besides arbitral award.

(x) Filing of direct appeal under Section 37-Not permissible

The Apex Court in National Thermal Power Corporation Ltd. v.

Siemens Atkeingesells Chaft, ruled that an appeal under Section 37(2) of the Act only lies if there is an order passed under Section 16(2) and (3) of the Act. Section 16(2) and (3) deals with the exercise of jurisdiction. The plea of jurisdiction was not taken by the appellant. It was taken by the respondent in order to meet their counterclaim. But, it was not in the context of the fact that the tribunal had no jurisdiction, it was in the context that this question of counterclaim was no more open to be decided for the simple reason that all the issues which had been raised in counterclaim had already been settled in minutes of meeting and it was recorded that no other issues to be resolved in contracts. Therefore, no question of jurisdiction was involved in the matter. In fact it was in the context of the fact that the entire counterclaims have already been satisfied and settled in the meeting that it was concluded that no further issues remained to be settled. In this context the counterclaims filed by the appellant was opposed. If any grievance was there, that should have been by the respondent and not by the appellant. It is only the finding of fact recorded by the Tribunal after considering the counterclaim vis-a-vis the minutes of meeting. Therefore, there was no question of jurisdiction involved in the matter so as to enable the appellant to approach the High Court directly.

The Apex Court was of the view that finding of fact recorded by the Tribunal that all the counterclaims stood covered by the decisions of the minutes of meeting though it was initially opposed by the respondent that it was not arbitrable or tribunal could not go into counterclaim despite that it examined on the merit of the matter and the merits the Tribunal disposed of the counterclaim by giving parties award. The appellant thus, cannot raise the question of jurisdiction and bring its case under Section 16(2) and (3) of the Act.

Hence, tiling direct appeal under Section 37 is not permissible, as no question of jurisdiction arises in the matter.

(xi) Plea that there is no arbitration clause- cannot be raised by the principal

In Arishna Bhagya Jala Nigam Ltd. v. Harishchandra Reddy &

another, where plea of no arbitration clause" was not raised in the written statement filed by Jala Nigam before the arbitrator. The said plea was not advanced before the Civil Court in arbitration case. On contrary both the Courts below on facts have found that Jala Nigam had consented to thearbitration of the disputes by the Chief Engineer, Jala Nigam had participated in arbitral proceedings. It submitted itself to the authority of the arbitration. It

gave consent to the appointment of the Chief Engineer as an arbitrator. It filed its written statement to the additional claims made by the contractor. The Executive Engineer who appeared on behalf of Jala Nigam did not invoke Section 16 of the Arbitration Act. He did not challenge the competence of the arbitral tribunal to rule on its jurisdiction. On the contrary, it submitted to the jurisdiction of the arbitral tribunal. It also filed written statement. It has been held by the Supreme Court that in the present case appellant Jala Nigam cannot be permitted to raise new plea in the First Appeal that there was no arbitration clause in the agreement as it is not tenable **(xii) Appeal against Arbitral Tribunal is not maintainable in the High Court**

According to the Division Bench of the Allahabad High Court an appeal is not maintainable in the High Court against an order passed by the Arbitral Tribunal under Section 16(2) or 16(3) of the Arbitration and

Conciliation Act, 1996.

Interpreting the provisions of Section 37 of the Act the Bench ruled that the High Court is not a principal Civil Court of original jurisdiction (herein Uttar Pradesh). The Court said that against an order passed by Arbitral Tribunal, appeal would lie in principal Civil Court of original jurisdiction in a district and not in the High Court, which does not have ordinary original civil jurisdiction.

The Bench gave this ruling on an appeal filed by M/s. Rampal Singh Mukhtar Ahmad against the order passed by the Arbitral Tribunal. The Counsel appearing for the appellant had argued that under Section 37 of the Act the appeal is maintainable only in the High Court against an order passed by the Arbitral Tribunal under Section 16(2) or 16(3) of the Act and not in the principal Civil Court of original jurisdiction. The court in view of above observation dismissed the appeal, holding the appeal in the High Court is not maintainable.